Eight Mile Style, LLC et al v. Apple Computer, Incorporated Doc. 45

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EIGHT MILE STYLE, LLC and
MARTIN AFFILIATED, LLC,

Plaintiffs

vs.

APPLE COMPUTER, INC. and
AFTERMATH RECORDS d/b/a
AFTERMATH ENTERTAINMENT,

Defendants.

_______________________________________/

Case No. 2:07-CV-13164
Honorable Anna Diggs Taylor
Magistrate Judge Donald A. Scheer

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO BIFURCATE DAMAGES DISCOVERY AND TRIAL

Daniel D. Quick (P48109)
Dickinson Wright PLLC
38525 Woodward Avenue
Suite 2000
Bloomfield Hills, MI 48304
(248) 433-7200
dquick@dickinsonwright.com

Kelly M. Klaus
Munger, Tolles & Olson LLP
355 South Grand Avenue
Suite 3500
Los Angeles, CA 90071-1560
(213) 683-9238
kelly.klaus@mto.com

Attorneys for Defendants

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I. INTRODUCTION

Every one of Plaintiffs' arguments against bifurcating the liability and damages issues in this case is without merit. Plaintiffs are wrong that Defendants must show this case is "exceptional" before the Court can bifurcate unrelated issues. The Sixth Circuit is clear that the Court has broad discretion to order bifurcation where the purposes of Rule 42(b) are served, as they are here. Plaintiffs cannot refute that the evidence on liability and Defendants' net profits is wholly unrelated. Nor can they deny that Defendants' pending summary judgment motion – which demonstrates that Defendants' use of the Eminem Compositions was fully licensed by Plaintiffs – if granted will obviate the need for any damages discovery. Plaintiffs also are wrong that a supposed overlap between liability and statutory damages issues (namely, willfulness) weigh against bifurcation. The issue is whether Plaintiffs will be entitled to pre-liability discovery of Defendants' *net profits*; willfulness is totally irrelevant and unrelated to net profits. The prejudice to Defendant Aftermath Records ("Aftermath") is palpable, given the *undisputed* evidence of the burden that Plaintiffs' requests would impose on UMG (one of Aftermath's owners) to compile net profits information in response to Plaintiffs' discovery requests. Plaintiffs are wrong that Defendants delayed in bringing this motion: Defendants moved promptly after Plaintiffs, during the meet-and-confer, refused to defer net profits discovery.

Plaintiffs' contrived arguments show that their objective is to make pretrial discovery from Aftermath as burdensome and expensive as possible, *notwithstanding* that the Complaint does not contain a single allegation that Aftermath engaged in copyright infringement (much less that it did so willfully), and that a favorable liability determination (as early as summary judgment) will moot any conceivable basis for time-consuming and costly forays into

Aftermath's net profits. At a minimum, the Court should rule on this Motion together with Defendants' pending motion for summary judgment.[1]

II. LIABILITY AND "ACTUAL DAMAGES" ARE SEPARATE ISSUES, THE BIFURCATION OF WHICH WILL SERVE THE PURPOSES OF RULE 42(b)

Sixth Circuit law is clear that the Court has broad discretion to order bifurcation of separate issues under Fed. R. Civ. P. 42(b). *American Trim, L.L.C. v. Oracle Corp.*, 383 F.3d 462, 474 (6th Cir. 2004); *In re Bendectin Litigation*, 857 F. 2d 290, 307 (6th Cir. 1988). Contrary to Plaintiffs' claim that bifurcation is the exception, courts in this District have bifurcated liability and damages issues in copyright cases. *See Jones v. Blige*, No. 04-60184, Docket No. 79 (E.D. Mich. Mar. 24. 2006) (order granting in part defendants' motion to bifurcate) (Reply Ex. 1); *Fharmacy Records v. Simmons*, No. 05-72126, Docket No. 70 (E.D. Mich. Mar. 3, 2006) (scheduling order for liability phase of discovery) (Reply Ex. 2); *id.*, Docket No. 68 (Feb. 27, 2006) (Rule 26(f) report with defendants' request for bifurcation) (Reply Ex. 3).

Liability and Net Profits Issues Are Wholly Unrelated: Plaintiffs claim that damages are not separate from liability because they may seek statutory damages for willful infringement, and proof of liability and willfulness is "inextricably intertwined." Opp. at 4. This is a red herring: Defendants' Motion seeks bifurcation of liability from discovery and trial of "actual damages." Actual damages, *unlike statutory damages*, involves a complex determination of the infringer's net profits that are attributable to the infringement. 17 U.S.C. § 504(b). Willfulness issues are unrelated to net profits.

[1] Defendants filed their motion for summary judgment on May 5, 2008. Plaintiffs sought and the Court granted an extension of the briefing schedule on the motion. Plaintiffs' brief in response is due on June 17, 2008. Defendants' reply brief is due on June 27, 2008.

The actual discovery record in this case undermines Plaintiffs' assertion that bifurcation will interfere with their ability to take discovery of issues they say go to statutory damages and willfulness, such as Defendants' supposed knowledge of infringement. The June 2, 2008 discovery cut off date is rapidly approaching in this case.[2] Plaintiffs have been conducting discovery on the issues they say go to willfulness for months now. Plaintiffs even requested an extension of their time to respond to Defendants' motion for summary judgment, claiming to need more time to digest all the depositions they have been taking. The depositions of Rand Hoffman, Lisa Rogell, Peter Paterno, Chad Gary, Todd Douglas, and Patricia Blair have all covered willfulness issues Plaintiffs identify (for example, UMG's knowledge of its right to license the Eminem Compositions and the course of dealing between UMG and Plaintiffs regarding mechanical licenses for the Eminem Compositions). Opp. at 4-5. Plaintiffs' written discovery also has addressed these issues. *See, e.g.*, Mot. Ex. 1 at 8, 10 (Plaintiffs' Request for Production Nos. 10, 11, 22-24). Nothing about this motion interferes with Plaintiffs' ability to conduct discovery on allegedly overlapping issues of liability and willfulness.

Plaintiffs' backup argument – that liability and willfulness issues overlap with net profits – also is wrong. Net profits are the "infringer's gross revenue," minus the infringer's "deductible expenses and the elements of profit attributable to factors other than the copyrighted work." 17 U.S.C. § 504(b). Questions of authorization and knowledge do not and cannot overlap with questions of net profits. Plaintiffs offer no support for their theory that even gross

[2] Plaintiffs' accuse Defendants of "foot-dragging" in opposing their requests for damages discovery and filing the Motion to Bifurcate. Opp. at 10. Plaintiffs are well aware that Defendants have not "do[ne] nothing in response [to their requests] for two and a half months." *Id.* The parties have been engaged in meet and confer efforts on these discovery requests and others since the beginning of April. Plaintiffs finally filed their motion to compel discovery on May 2, 2008. Defendants filed the instant Motion a week later, on May 9.

profits – let alone net profits – are evidence of willfulness. Opp. at 6. By Plaintiffs' admission, willfulness involves proof that the defendant knew its conduct constituted infringement, or that the copyright law so clearly supported the plaintiff's position that the defendant's infringement constituted reckless disregard of the plaintiff's copyright. *Zomba Enterprises, Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 584 (6th Cir. 2007). Defendant's profits simply are not relevant to willfulness. If profits were relevant to willfulness, a plaintiff could avoid bifurcation in any copyright infringement action and obtain damages discovery with the unsurprising allegation that a defendant was motivated, at least in part, by a desire to make a profit.

Bifurcation Serves Judicial Economy and Convenience and Will Not Prejudice Plaintiffs: Bifurcation indisputably will save resources and serve judicial economy. Net profits and liability (or willfulness) issues are separate. They do not involve the same sources of proof. It is undisputed that the process of preparing profit and loss reports for Aftermath for each individual composition in issue will entail gathering and synthesizing documents relating to income and costs across the entire process of creating, marketing and distributing a sound recording embodying the compositions in issue. Ciongoli Decl. ¶ 4 (Mot. Ex. 7). This process will consume hundreds of employee hours. *Id.* ¶ 8. These documents and the required analysis are not necessary for or relevant to a liability determination. Moreover, the Complaint does not contain a single allegation that Aftermath engaged in copyright infringement; the Complaint alleges that *Apple* infringed Plaintiffs' copyrights and seeks *Apple's* net profits. Compl. ¶ 13; Prayer for Relief ¶ C. It is economical to avoid the expense and time associated with the net profits determination until it is necessary. This is not an inappropriate "likelihood of success on the merits" test for bifurcation, as Plaintiffs' claim. Opp. at 7. The law is clear that the Court must consider the separateness of the issues and the probability that resources will be saved by determining one issue before another. *See, e.g.*, *Hines v. Joy Manufacturing Co.*, 850 F.2d 1146, 1152 (6th Cir. 1988). The conservation of resources is a distinct possibility in this case, given Defendants' pending motion for summary judgment.

Plaintiffs' claims that they will suffer prejudice because of the costs of a second trial and the delay in obtaining relief are equally without merit. The costs (and burdens) of determining net profits will be the same whether discovery and trial on this issue occurs now or later. Further, bifurcation will always involve some delay in getting to the issues that have been bifurcated. Plaintiffs have not explained why some delay in obtaining relief, if they are entitled to it, is harmful to them. To the extent that a finding on liability might encourage the parties to settle during the damages discovery and trial, this weighs in favor of bifurcation, not against it as Plaintiffs suggest. *See* Opp. at 8. Settlement would obviate the need for the parties and the Court to complete damages discovery and trial.

III. CONCLUSION

For the forgoing reasons, Defendants respectfully request that the Court grant Defendants' Motion to Bifurcate Damages Discovery and Trial. In the alternative, Defendants respectfully request that the Court defer ruling on this Motion until it also rules on the pending motion for summary judgment.

Respectfully Submitted,

s/Daniel D. Quick
Daniel D. Quick (P48109)
Dickinson Wright PLLC
Attorneys for Defendants

Kelly M. Klaus
Munger, Tolles & Olson LLP
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2008, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the all counsel.

s/Daniel D. Quick
Daniel D. Quick (P48109)
Dickinson Wright PLLC
38525 Woodward Avenue
Suite 2000
Bloomfield Hills, MI 48304
(248) 433-7200
dquick@dickinsonwright.com